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Date: December 22, 1998

Case No.: 1997-LHC-1575

OWCP No.: 02-109998

In the Matter of:

Sun T Monsour

Claimant

vs.

Ramstein Air Force Base, Germany

Employer

and

Director, Office of Workers’

Compensation Programs

Party-in-Interest

Appearances:

William G. Skemp, Esq.

La Crosse, WI

For the Claimant

Peter F. Gedraitis, Esq.

San Antonio, TX

For the Employer/Carrier

Before: **THOMAS F. PHALEN, JR.**

Administrative Law Judge

### **DECISION AND ORDER - AWARDING BENEFITS**

This is a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act," as extended to cover certain employees under the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. § 2105(c) and § 8171, et seq., and 43 U.S.C. § 1331, and the governing regulations thereunder. It was filed on December 9, 1992, by Sun T. Monsour, Claimant, against Ramstein

Air Force Base in Germany, Employer and the Director of Workers' Compensation Programs, (OWCP), Party-in-Interest. The hearing was held on July 29, 1998, in Sparta, Wisconsin, pursuant to a Notice of Hearing dated June 18, 1998, at which time all parties were given the opportunity to present evidence and oral arguments. Post-hearing briefs were requested and have been made a part of the record herein. This decision is being rendered after having considered the entire record, which includes the testimony, the exhibits and the post-hearing briefs.<sup>1</sup>

### **Stipulations**<sup>2</sup>

The parties stipulate, and I find:

1. The Act applies to this proceeding.
2. Claimant and the Employer were in an employee-employer relationship at the time of the accident/injury.
3. The accident/injury arose in the scope of employment.
4. The accident/injury occurred on December 6, 1992.
5. The employer was advised of or learned of the injury on December 8, 1992.
6. Timely notice of injury was given to the Employer.
7. Employer filed a first Report of Injury (Form LS-202) with the Secretary of Labor on December 22, 1992.
8. Claimant filed a claim for compensation (Form LS-203) on December 23, 1992.
9. Claimant filed a timely notice of Claim.
10. Employer filed a timely Notice of Controversion (Form LS-207) on October 5, 1994.
11. Disability payments have been made as follows: Temporary Total Disability from 12-9-92 to 10-10-94, in the amount of \$143.34 for 95 6/7 weeks in the total amount of \$13,740.46.

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<sup>1</sup>The following references will be used: "T" for the official hearing transcript, "ALJ Ex." for Administrative Law Judge exhibits, "Jt. Ex." for Joint Exhibits, "Ct Ex." for Claimant's Exhibits, and "Er Ex." or "R. Ex." for Employer's/Respondent's Exhibits.

<sup>2</sup>The Parties submitted a signed document called Stipulations prior to the hearing which set forth both their agreed stipulations and statement of the issues. It was marked as Joint Exhibit 1, but was inadvertently neither offered nor admitted into evidence at the hearing. Absent objection of the parties the document is hereby deemed offered and admitted into evidence as Joint Exhibit 1.

12. Employer filed a Notice of Final Payment or Suspension of Compensation or Payments (Form LS-208) on October 13, 1994.

13. Claimant's "usual employment" consisting of her regular duties at the time of the injury as determined under Section 8(h) of the Act was as follows: Custodial Worker - Housekeeping

14. Claimant has not returned to her usual employment with the Employer since the date of the injury.

15. Since the date of the accident/injury, the work and earnings record of the Claimant is as follows: None.

16. Claimant's average weekly wage at the time of the accident/injury was \$143.34.

### **Issues**

"What injuries claimant has sustained as a result of claimant's work related injury, including physical and mental disabilities and injuries, travel expenses, unpaid medical bills, future medical expenses, loss of wages, and loss of earning capacity. See 33 USCA s. 907, 908." (Jt. Ex. 1)

### **Summary of Findings**

For the reasons stated herein, the Court finds that the Employer had timely notice of the Claimant's symptoms of back injury from the December 6, 1992 accident, and that she filed a timely claim for compensation. This court further finds that she suffers from a "musculoligamentous injury" (CX G) to her low back as a result of that injury, and a somatoform disorder, (CX G) and that she is entitled to an award of permanent total disability compensation benefits as a result of the injury arising out of and suffered in, the course of her employment.

### **Summary of the Evidence**

The Claimant, Sun T. Monsour, was born on March 3, 1950 in Puson, Korea, and had a high school education there. (T 90) She has a great deal of difficulty speaking and understanding the English language at a conversational level, to the extent that it would affect certain jobs that she could perform in the United States. (TR 89 - 124)<sup>3</sup> She is now age 48.

Claimant was injured on December 6, 1992 at Ramstein Air Force Base, Germany, where she was officially employed as a housekeeper in billeting until February, 1993. (TR 96) At that

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<sup>3</sup> Notations to grammatical errors in Claimant's testimony will be inserted only where necessary. Claimant was an honest, credible witness, with good demeanor, although somewhat uncomfortable from her perceived pain. I credit her testimony regarding her background, her injury and the effects of her injury.

time, her husband, Sgt. David Monsour, was transferred to Fort McCoy, Wisconsin and she moved there with him. She has not worked since that time in any paid position.

The present claim resulted from an injury suffered when she fell down several stairs to the basement, while performing her housekeeping duties. (T 99; Rx. 3C) She testified at the hearing that she bounced on three or four of the stairs with her buttocks; landed on her buttocks at the foot of the stairs on wet, rubber covered concrete, and was stunned. (TR 99) Although her back hurt, she continued to work that day and that evening and she put Ben Gay on it. (TR 101) On December 8, 1992, she reported the injury to her employer (TR 100) and went to the Ramstein Medical Clinic on December 9, 1992, where she received medication. (Ct. Ex. C) The U.S.A.F. Physician's Assistant, Captain David Diaz, who treated her on December 9, 1992, recorded her description of the accident as follows:

Fell down some stairs at work, impacting her right lower back, gluteus (sic) and sacrum.

\* \* \*

While working at Billeting she slipped and fell down a few stairs hitting lower (R) (Right) back, buttock and hip, 3 days before her visit. (Ct Ex. B)

His diagnosis was:

Contusion of L-S Spine and R Hip. (Ct Ex. B)

He stated the anticipated period of disability to be: "From 9 Dec to Unknown, (1 Jan 93), (Ct Ex. B) He directed that if she was able to return to work, it be only "light work" with: "No bending, lifting more than 20 pounds." (Ct Ex. B)

Claimant had no other back injuries, either before or after that of December 6, 1992. (T 102)

She testified that she was very active before the injury; that she was a sports "mom," driving her son to school sporting events with other teams all over Europe and traveling with her husband whenever she could do so. She was "almost a professional" mountain climber growing up, in Korea, and performed child care duties for high ranking officers of the U.S. Military. (Tr. 90-96)

She described her pain from then to the present as follows:

Next four years even that entire time even I carry suffering pain with it. I try the best I could knowledge it what I can do still, but couldn't take no more. More drop the activity because I have this back kind of pain 24 hours. It doesn't go nowhere. This thing is

related leg, arm, my upper back, shoulders, neck. It's numbness. Its have no strength. (T 103)

With regard to what she is able to do, She stated:

Actually, I do not have a long limitation. Actually don't. But I still keep on. Very important to me. Keep on activity, even little things. Even few wash dish. Just whatever I do I put in my limit to do dish wash. Very limited to do dish wash .... exercise as walking.....exercise as walking. Everything limitation I do limit. ... I have this problem — back problem, chronic pain. Always have, always. (T104)

When asked whether she could work eight hours, she stated: "I don't have that function. I cannot holding ... the newspaper. How can I get somebody whose going to hire me?" (T 104-105).

Claimant testified that as medications she takes Skelaxin, Cataflam, Effexor, Alfrazerim, Ambien and temezapam, every day.

On cross examination, Mrs. Monsour confirmed that besides medical diagnoses regarding vaginitis and removal of polyps, she could not show another medical report that demonstrates an injury to her back by tests, besides her own statement of symptoms. (T 121) Basically, she was unaware of any objective medical test that showed any physical medical problem other than her back, (T 120) and that there was "nothing much" that she knew of other than those involving her female problem and her polyps. (T122)

Claimant was asked a number of questions about her stress, to which she confirmed a number of references in various medical reports (e.g., R. Ex. 1A and E) and confirmed that she reported stress concerning transportation, her husband's care for her, and basement floods at her house. (T 113-115)

Sgt. David Monsour met Claimant in Korea in 1976, and he married her there in 1977. (T 40) After an illustrious career in Korea, in the State of Washington, in Viet Nam, again in Korea, and in Fort Polk, Louisiana, performing duties in various aspects of security, he was assigned to Ramstein Air Force Base in Germany as Chief of Security in Counter-terrorism. After his transfer to Fort McCoy, Wisconsin in November, 1993, where he served as a physical security inspector, he retired from there two months later due to Mrs. Monsour's treatment schedule. (T 37-38)

Mr. Monsour testified that Claimant took some courses in English and child care, including CPR and safety courses, and billeting. She took the courses in child care to care for children at Ramstein. (T 41) At Ramstein, she was a child care worker (20-25 children a day), for which she received extensive training and a License from the Department of Defense, and worked in billeting. (T 25 & 46) Before her accident in December, 1992, they had traveled extensively in Korea and in Europe. (T 42) Their child, a son, played sports, and she drove him all over Europe

to various games as a “Team Mother.” She took the team hiking in the Alps. The family mountain climbed together, and did extensive hiking.(T 44-45)

He testified that on the day that the Claimant was injured, she came home and informed Mr. Monsour of the event, and of the fact that she had continued working. She also worked the next day, after which she informed him that she was not feeling good. The following day he took her to the Ramstein troop medical clinic, where “they started to treat her with various kinds of physical therapy.” (T 46) He stated that she could barely walk, and he had to take time off to transport her to the clinic, and he would, “have to carry her in to the medical clinic.” (T 47) He was then a Sargent First Class, and Chief of Security, Counter-Terrorism, and had to make arrangements with his chain of command to be off from work. (Ibid.) He called the next two months there, “a nightmare,” caring for someone who had gone from one who did mountain climbing to one who had to be carried by him. He had finished his tour of duty at Ramstein, and was due to transfer to Fort Sill, Oklahoma. Instead, he had his assignment transferred to Wisconsin to be near his relatives, and to help care for the Claimant. (T 47-48) For her therapy in Wisconsin, he had to transport the Claimant to Madison and LaCross, Wisconsin, since the doctors wanted to see her every day. That would take several hours a day. It ultimately resulted in filing his retirement application two months after his move to Wisconsin, and retiring from the Army, even though he had not planned on doing so, and was being trained to take over as a First Sargent. (T 49-50)

For the next two years, he testified that it was “constant pain for her,” and “on the road ... just taking her to the hospital to get treatments.” (T 51) He recounted periods of “relief” and of “relapse,” and a “work ethic” that resulted in her trying things such as vacuuming that she should not have been doing. (Ibid.) He testified that whenever they do something, she has to remain in bed for several hours. If he accidentally hits her with an arm in bed at night, “she’ll just scream. Its like a shock going through the whole house and it just terrifies me.” As a result she often leaves their bedroom to sleep somewhere else. (T 52)

He said that Claimant can do light laundry, but he has to carry it out, and hang up such things as a towel because she cannot due so, due to her pain. She does light dusting, but he had to hire someone to clean up the house. She can use the microwave, but does not the cooking, “that she’s used to.” She can skim their swimming pool with a small net for small leaves, mosquito’s, etc., but he must do the vacuuming, cleaning and filtration of it, and things of that nature. (T 53-54) She will try limited gardening by sitting on the ground at one location and work at that one location with a small rake, but cannot turn over wet dirt with it. (T 55) Mr. Monsour states that he observes her in pain when performing all of these activities, in a way that did not previously exist in their 21 year marriage. (T 65-66)

Jenny Perie Sambrun, Mrs. Monsour’s next door neighbor, also credibly testified to her condition from her back problems, and the help that she has had to give her. This included the ability to perform only a very basic amount of physical housework, to the point that her personal pride in her ability to work has been affected. (T 22-30)

Kevin Lawrence Schutz, who has a Master of Science degree in rehabilitation services testified to his 20 year experience in the field of rehabilitation and his vocational evaluation reports of Claimant's condition for purposes of work. (Ct. Ex. M; T 67-89) The first was issued in June 1998, and reviewed the last report by Claimant's treating physician, Dr. Dierschke dated in August, 1994. It then showed a loss of earning capacity of 50% to 55%, based on her pre and post injury occupational alternatives. (T 71) He testified that she was, "going to need accommodations in most unskilled light types of work settings," (T 72) and that he could not, "describe any skilled or semiskilled setting where she would appropriately be placed." (Ibid.) Light levels of work requiring "speed and repetitive movement," or requiring one "to stay in one posture for long periods of time," could not be done by Claimant without "accommodation" and "restructuring of the job," through negotiations with the employer to make it consistent with her restrictions. (T 73) These would include such jobs as assembler class C and electronic assembler. Her problem would be the competition with those who did not require the accommodations, based upon her functional capacity in 1994, which would require the creation of a position for her. (T 75)

In his supplemental report of July 15, 1998, Mr. Schutz reviewed new information regarding her functional limitations from Dr. Dierschke's June, 1998 report, and that of Dr. Most. (T 76; Ct Exs. K & ) Dr. Most's report described a somatoform pain disorder and its relationship to her physical problems and a form describing Claimant's functional limitations by Dr. Dierschke. Her 1994 report suggest residual functions that would have allowed certain kinds of sedentary and light work. The 1998 report, in his opinion, "suggested an individual that really had nominal tolerance for any sustained or competitive work activity, which would be, "less than sedentary." (T 78) She could only work "somewhere in the range of two to four hours a day, with very select types of postures and very limited physical exertion." (Ibid.)

Describing Dr. Most's report in terms of physical limitations, Mr. Schutz noted his treatment for depression and somatoform disorder, in which Claimant, "is not malingering"<sup>4</sup> and "experiences a significant amount of pain," related to the injury of 1992. (T 78) From that he concluded that she is totally and permanently disabled for vocational purposes in terms of the resulting restrictions. (T 79) He stated that he could not, "to a reasonable degree of vocational certainty under this set of restrictions indicate any type of competitive work that Mrs. Monsour could do on a sustained basis." (Ibid.)

In addition, Mr. Schutz reviewed the jobs listed by Mr. Robert Harlow in his letters of September 14 and 21, 1994 with a similar conclusion, namely that she could not perform any of those jobs given her current restrictions as indicated by Dr. Dierschke and Dr. Most, on either a full time or part time basis. (T 80)

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<sup>4</sup>Note: This an essential element of the diagnosis of a somatoform disorder; namely, as stated by Tierney, McPhee and Papadakis in Medical Diagnosis and Treatment, 1994, (@ 879): "*It must be accepted that the patient's distress is real. Every problem not found to have an organic basis is not necessarily a mental disease.*" Emphasis quoted.)

The Employer's witness, Robert Harlow, has a Master of Science Degree in Educational Psychology from the University of Wisconsin, and has been working in all aspects of vocational rehabilitation since 1975. He is also a Certified Rehabilitation Counselor. (T 126) He was engaged by the United States Air Force Insurance Foundation to give an opinion on Claimant's vocational options following her work injury of December 6, 1992 and the restrictions of Dr. Dierschke of August 3, 1994. (Ibid.) He talked to Mrs. Monsour on September 1, 1994. He described Dr. Dierschke's light work restrictions given her educational and work experience, resulting in six positions that she could perform: Activity aide, clerk/cashier, cleaner/custodian, companion/homemaker, food service worker, and laundry worker. (T 127) From these he conducted market surveys, utilizing the described work restrictions, transferable skills and education, considering her language limitations. He also considered geographical limitations, with entry level wage rates. (T 128) From this 1994 report, he concluded that there were six jobs in the child care business that she could perform, at an entry level position, at least on a part time basis. They included a child care teaching assistant, an assistant Christian Education position, a nanny, a Discovery Child Care position working with children six weeks to five years old, "Some type of companion /homemaker type of situation," some clerk/cashier positions such as a desk clerk at Excel Inn and others that he had not been able to investigate fully, one light industrial assembly position, concerning which he expressed a sustainability reservation, and another bell tender position at Duro Tech where a stool could be provided. (T 130-140)

On cross examination, Dr. Harlow confirmed that he did not meet with or evaluate the Claimant, (T 141) and that he did not know what type of child care certification Claimant had, but stated that the positions he had considered were entry level child care aide positions. (T 145) However, after a review of the effect of various restrictions that had been imposed by Dr. Dierschke in her latest report, Mr. Harlow confirmed:

The culmination of those restrictions that have most recently been imposed by Dr. Dierschke would create a nonstable labor market for Ms. Monsour. (T 150)

On the basis of the totality of this record and having observed the demeanor and having heard the testimony of a credible Claimant/witnesses, I make the following:

### **Findings of Fact and Conclusions of Law**

In arriving at a decision in this matter, the Administrative Law Judge, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978). At the outset it further must be recognized that all factual doubts must be resolved in favor of the claimant. **Wheatley v. Adler**, 407 F.2d 307 (D.C.

Cir. 1968); **Strachan Shipping Co. v. Shea**, 406 F.2d 521 (5th Cir. 1969), **cert. denied**, 395 U.S. 921 (1970). Furthermore, it has been held consistently that the Act must be construed liberally in favor of the claimant. **Voris v. Eikel**, 346 U.S. 328 (1953); **J.V. Vozzolo, Inc. v. Britton**, 377 F.2d 144 (D.C. Cir. 1967). Based upon the humanitarian nature of the Act, claimants are to be accorded the benefit of all doubts. **Durrah v. WMATA**, 760 F.2d 320 (D.C. Cir. 1985); **Champion v. S & M Traylor Brothers**, 690 F.2d 285 (D.C. Cir. 1982); **Harrison v. Potomac Electric Power Company**, 8 BRBS 313 (1978).

The Act provides a presumption that a claim comes within the provisions of the Act. See 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Anderson v. Todd Shipyards**, *supra*, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that a "**prima facie**" claim for compensation, to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **U.S. Industries/ Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/ Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, *i.e.*, harm to his or her body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita, supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier, supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's

condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue, resolving all doubts in claimant's favor. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

In the present case, Claimant alleges that the harm to her bodily frame, as the effects of a fall down stairs while performing the tasks of her employment, have caused continuous debilitating pain and a somatoform disorder, from which she is permanently and totally disabled. The Employer has introduced no independent evidence severing the connection between such harm and Claimant's employment, but has addressed questions to the Claimant concerning stress and other matters that hint at such a rebuttal position.<sup>5</sup> It is my opinion that the Claimant has established a *prima facie* claim that such harm is a work-related injury, as shall now be discussed.

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. See 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), *rev'g* **Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), *aff'd sub nom. Gardner v. Director, OWCP*, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Janusiewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos, supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related

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<sup>5</sup> In this regard, see **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989).

condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

Pain and limitations from Claimant's pain have been well described by the witnesses, and well documented by those who saw the Claimant as medical professionals, continuously, since her 1992 injury. The 393 pages of documents from Gundersen Lutheran Hospital, alone, (Ct. Ex. G)<sup>6</sup> document the continuous subjective complaints of pain by the Claimant, and the struggle to identify the effects of Claimant's injury, and her rehabilitation.

The problem with this case is that the Claimant's complaints have continuously appeared to exceed the scope of any diagnosis - until that of Dr. Most. Even Dr. Dierschke, in her 1994 diagnosis and 50-55% residual functional capacity report, recognized the need for a psychiatric evaluation for a somatoform disorder. This resulted in the positive diagnosis of such a disorder by Dr. Most. As stated above, the essential element of his diagnosis is that the Claimant is not malingering, and that the sensation of pain being experienced by her is just as real and debilitating to her as if she had a specific medical diagnosis of an identifiable injury.

Buttressed by the July 14, 1998 report of Dr. Most, Dr. Dierschke revised her 1994 report on June 24, 1998 to opine that the Claimant's chronic back pain, somatoform disorder and accompanying depression, left her with extreme limitations on her ability to deal with the normal stresses of competitive employment. These included such qualities as working at a consistent pace, working appropriately with coworkers and supervisors, and not taking an excessive number of breaks. She could only sit or stand for periods of fifteen to thirty minutes, for a maximum of two hours, and could only stand or walk for a combined period of two hours. She would also have to lie down for two hours, two times a day. (Ct. Ex. K) From these limitations, and her other enumerated limitations, Mr. Schutz and Mr. Harlow have confirmed that they destabilized her in a search for competitive employment.

It is my conclusion that Claimant's condition had the effect of eliminating her from competitive employment, and that she is therefore, permanently and totally disabled from such employment as a direct result of her employment related injury, and that this condition has existed from the date of her original injury on December 6, 1992.

The facts of the present case are not unlike those of the chronic back pain analysis in Frye v. Potomac Electric Power Co, 21 BRBS 194,196 (1998). There, the Board examined the §20(a) presumption regarding the causal relationship of Mr. Fry's later diagnosed back problems and chronic pain syndrome, when a work accident occurred and these symptoms evolved in conjunction with an ankle injury suffered in the accident. Here, the Employer is attempting to separate the back pain symptoms of the accident from a later diagnosed somatoform and depression condition, by use of alleged intervening stress evidence, apart from the accident as the

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<sup>6</sup> See also, the Ramstein Medical Records, the Gundersen Clinic - Tomah Medical Records, the St Mary's Hospital - Sparta Medical Records, the Gunderson Clinic - Sparta Medical Records, the Mayo Clinic Medical Records and the Bronston Chiropractic Medical Records. (Ct. Exs. C-F & H-I and see Resp. Exs. 1 - 8)

cause. However, it has presented no objective evidence that there was any other cause of the stress other than the overall effects of the Claimant's 1992 injury.

As an initial consideration, a psychological impairment can be an injury under the LHWCA if work-related. Director, OWCP v. Potomac Elec. Power Co. (Brannon), 607 F.2d 1378, 10 BRBS 1048 (D.C. Cir. 1979) (work injury results in psychological problems, leading to suicide). See also Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255 (1984) (benefits allowed for depression due to work-related disability); Whittington v. National Bank, 12 BRBS 439 (1980) (remand to determine whether stress and pressure at work aggravated psychiatric condition); Moss v. Norfolk Shipbuilding & Dry Dock Corp., 10 BRBS 428 (1979) (although claimant's anxiety condition is not an occupational disease, it is compensable as an accidental injury). Moreover, headaches resulting from a work-related incident may be compensable under the LHWCA. Spence v. ARA Food Serv., 13 BRBS 635 (1980).

In Tezeno v. Consolidated Aluminum Corp., 13 BRBS 778 (1981), the Board affirmed an award of permanent total disability as a result of the employee's "functional overlay" and "related negative rehabilitation potential," holding that "a psychological impairment is compensable where a work-related accident has psychological repercussions." Tezeno, 13 BRBS at 782 (quoting Tampa Ship Repair & Dry Dock v. Director, OWCP, 535 F.2d 936 (5th Cir. 1976)); Moss, 10 BRBS 428.

In Sinclair v. United Food & Commercial Workers, 23 BRBS 148 (1989), the Board, in discussing the parameters of the Section 20(a) presumption, stated that the presumption applies to the issue of whether an injury is causally related to employment and the Board rejected the employer's argument that the presumption does not apply unless the claimant establishes that her psychological condition is caused by a psychiatric reaction to the physical symptoms she suffered while at work, and held that the claimant **need not affirmatively prove causation**. Once the claimant establishes the elements of a **prima facie** case, i.e., the existence of physical harm and working conditions which **could have caused** such harm, the presumption provides the causal nexus.

Whether there was any other independent cause for the stress or not, under Frye, once the Claimant establishes the two elements of her *prima facie* claim the Section 20(a) presumption applies to link the harm or pain with Claimant's employment, and, "only if the employer provides 'specific and comprehensive' evidence sufficient to sever the connection between the injury and the employment," should the benefits be denied. In the present case, no such "specific and comprehensive" evidence sufficient to sever the connection between the psychological injury and the employment, has been presented, and the Employer's cross examination of the Claimant did not establish such evidence. I therefore find that Claimant's somatoform disorder, and its related depression and stress were caused by the Claimant's 1992 work injury, and not by some other independent cause.

It is my conclusion from a reading of the medical reports and the testimony of the Claimant, her husband and her neighbor, all of whom testified credibly at the hearing, that the Claimant has continuously experienced severe debilitating back, shoulder and neck pain as a direct

consequence of her accidental fall down the stairs at Ramstein Air Force Base Germany in which she suffered a musculoligimentous injury from the fall, and a severe debilitating somatoform disorder with depression. Wrapped into this picture is the stress that forms the basis for the depression analysis of Dr. Most, and its affects on the residual functional capacity of the Claimant as set forth by Dr. Dierschke in her June 24, 1998 report.

It is my opinion that the effects of Claimant's injury, namely, her chronic back, shoulder and neck pain, and resulting somatoform disorder, whether considered as a direct result of that injury or as an aggravation of it, were naturally and unavoidably the results of her accidental injury. As a result, the 1992 injury was work related, and is fully compensable under the provisions of this act.

I also find that, as of Dr. Dierschke's August 3, 1994 report, the Claimant had reached her maximum medical improvement, as that condition was later clarified by the diagnosis of somatoform disorder and depression by Dr. Most. Dr. Dierschke clearly anticipated the effects of such a determination in her 1994 report, and those effects are legitimately reflected in her revised report of June 24, 1998. This revision yielded a residual functional capacity by medical evaluation that the vocational experts correctly interpreted as having disqualified the Claimant from competitive sedentary employment. There is no suitable alternative employment that exists for the her under these limitations.

Claimant's permanent total disability has, therefore, been clearly established, and she is entitled to the appropriate benefits under the Act.

#### The Responsible Employer:

Ramstein Air Force Base Germany was the employer with whom he had his most recent period of cumulative qualifying employment, and, therefore the properly designated responsible employer, herein.

### **ORDER**

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore ORDERED that:

1. The Employer shall pay to the Claimant compensation for her temporary total disability from December 9, 1992 through October 10, 1994, based upon an average weekly wage of \$143.34, such compensation to be computed in accordance with Section 8(b) of the Act.

2. Commencing on December 11, 1994, and continuing thereafter for 104 weeks, the Employer shall pay to the Claimant compensation benefits for her permanent total disability, plus the applicable annual adjustments provided in Section 10 of the Act, based upon an average weekly wage of \$143.34, such compensation to be computed in accordance with Section 8(a) of the Act.

3. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of her December 6, 1992 injury.

4. The Employer shall reimburse the Claimant for any medical expenses he has incurred for treatment of his injuries sustained on December 6, 1992, or shall directly pay such sums as will satisfy medical bills incurred by the Claimant but not paid, for treatment of his injuries.

5. A period of thirty (30) days is hereby allowed for Claimant's Counsel to submit a fee petition. The Employer's attorney shall file, within twenty (20) days of the receipt of this fee petition, any objections it may have to this fee petition.

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THOMAS F. PHALEN, JR.  
Administrative Law Judge